



## OFFICE OF THE ATTORNEY GENERAL

SLADE GORTON ATTORNEY GENERAL  
TEMPLE OF JUSTICE OLYMPIA, WASHINGTON 98504

ADMINISTRATIVE LAW--RULES AND REGULATIONS--ADMINISTRATIVE  
PROCEDURES ACT--STANDING OF GOVERNMENTAL AGENCY TO PETI-  
TION ANOTHER AGENCY FOR RULE-MAKING PROCEEDINGS.

In view of a recent decision by the Washington supreme  
court holding that a governmental agency is not a  
"person" within the meaning of the state administrative  
procedures act, a federal agency such as the Federal  
Trade Commission is not legally entitled, under RCW 34-  
.04.060, to submit a petition to the Washington state  
liquor control board to amend or repeal regulations pre-  
viously adopted by that state agency.

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April 28, 1977

Honorable L. H. Pedersen  
Chairman, Washington State  
Liquor Control Board  
Olympia, Washington 98504

Cite as:  
AGLO 1977 No. 19

Dear Sir:

By recent letter you have requested a formal attorney  
general's opinion on the following question:

"Has a federal agency, such as the  
Federal Trade Commission, any standing  
or authority to petition the Washington  
State Liquor Control Board to amend or  
repeal regulations adopted by the Board?"

We respond to the foregoing question in the manner set  
forth below.

### ANALYSIS

#### I. Introduction:

By way of background you have informed us that on February  
18, 1977, the state liquor control board received a peti-  
tion from the Seattle regional office of the Federal Trade  
Commission asking the board to repeal certain regulations  
relating to advertising by retail liquor licensees (WAC  
314-52-110(2) and 112(4)), beer wholesale price posting

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<b>DEFENDANT'S EXHIBIT</b>	
CASE NO.	C04-0360P
EXHIBIT NO.	478

TX478-001

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(WAC 314-20-100), beer suppliers' price filings (WAC 314-20-105), wine wholesale price posting (WAC 314-24-190) and wine suppliers' price filings, contracts and memoranda (WAC 314-24-200). Accompanying the petition was a lengthy legal memorandum contending, basically, that the liquor board lacked the legal authority to have adopted those particular regulations. Significantly, however, the petition was filed with the board in an apparent attempt to invoke the provisions of RCW 34.04-.060 instead of with the superior court under RCW 34.04-.070.<sup>1</sup> In other words, even though the actual thrust of the FTC's petition was an attack upon the validity of the rules (based upon an alleged lack of authority) its choice of remedies was to seek their repeal by the board itself rather than to challenge them in court. Quite possibly, that procedure may have been followed by the FTC because of doubts on its part as to its legal "standing" to challenge the rules under RCW 34.04.070, supra, by reason of an inability to show that the rules in question in any way ". . . interfere or impair, the legal rights or privileges of the petitioner . . .". Or, perhaps, the FTC merely felt that it wanted to give

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<sup>1</sup> Both RCW 34.04.060 and .070 are part of the state administrative procedures act (APA). The first of those sections, however, relates to the promulgation, amendment or repeal of any administrative regulation and provides that "any interested person" may petition an agency for such action - while the second provides for judicial review of the validity of any such regulation as follows:

"(1) The validity of any rule may be determined upon petition for a declaratory judgment thereon addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair, the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question."

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the board an opportunity to repeal or modify the rules on its own before they were subjected to judicial scrutiny. But in any event that is what occurred.

You have next indicated that upon its receipt of the petition the board took it under advisement and then, on February 22, 1977, voted to initiate rule-making proceedings in accordance with RCW 34.04.025 - also a part of the APA. In addition to the outright repeals suggested by the FTC, however, the board, on its own motion, decided also to consider possible amendments to the same rules as an alternative and thus both proposals (repeal and amendment) were included in the notice of rule making required by the law. A hearing on the proposed rule changes was then convened on March 22, 1977, at which time certain attorneys representing the industry appeared and urged, inter alia, that the FTC should not be allowed to participate. In essence their position on that issue was that aside from whatever problems it would have had in challenging the rules under RCW 34.04-.070, supra, this federal agency lacked the legal authority or standing to ask for their repeal or amendment under RCW 34.04.060.

## II. Consideration of Question Presented

It is, of course, in response to the above circumstances that the instant request for an attorney general's opinion has since been submitted. At the same time, however, you have also informed us that the board has gone ahead with its hearing on the proposed rule changes - most recently by way of a second session of the hearing which was conducted on April 19, 1977. And, most definitely, it is our opinion that the board was, and remains, on sound legal ground in proceeding in that manner. Although it is true that rule-making proceedings may be invoked under RCW 34.04.060<sup>2</sup> through the filing of a petition by any "interested person," such action is by no

<sup>2</sup> RCW 34.04.060 reads, in full, as follows:

"Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition. Within thirty days after submission of a petition, or at the next meeting of the agency if it does not meet within thirty days, the agency shall formally consider the petition and shall within thirty days

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means a legally required condition precedent to the initiation of such proceedings. Under the APA an agency (such as the liquor control board) which is possessed of rule-making authority<sup>3</sup> is, in the alternative, entirely free at any time to initiate rule-making proceedings in the exercise of that authority on its own motion either by adopting new rules or by amending or repealing existing rules. Accord, RCW 34.04.025, et seq. And in this case, to a certain extent at least, that is precisely what the board, in fact, did when it included in its notice of intent to engage in rule making not only the question of repeal of the particular regulations challenged by the FTC but, as well, the question of possible revision or amendment of those same rules.

That having been done, however, and the board having then proceeded to conduct hearings in accordance with that notice; it would also now appear that the precise question which you have asked has become moot insofar as this particular case is concerned.

In addition, we should also point out, in any event, a further difficulty with that question as you have phrased it; i.e.,

"Has a federal agency, such as the Federal Trade Commission, any standing or authority to petition the Washington State Liquor Control Board to amend or repeal regulations adopted by the Board?"  
(Emphasis supplied.)

The problem is that to the extent that it inquires as to the authority of a given federal agency the question calls upon us to render an opinion on matters of federal rather than state law, for the powers of a federal agency quite clearly stem not from any state law but from the various federal statutes by which it was created and is now governed. For fairly obvious reasons it has long been a policy of this office not to attempt to render opinions on questions pertaining to the meaning or interpretation of federal statutes or regulations - as

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2 Cont'd:

thereafter either deny the petition in writing (stating its reasons for the denial) or initiate rule-making proceedings in accordance with RCW 34.04.025."

3 See, RCW 66.08.030.

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other word in the phrase - i.e., "person" - we are immediately confronted with the proposition that as construed by the Washington supreme court just last month<sup>5</sup> in Washington State Liquor Control Board, et al. v. Washington State Personnel Board, et al., 88 Wn. 2d 368, \_\_\_ P. 2d \_\_\_ (1977), the word "person" as used in the Administrative Procedures Act does not include governmental agencies at all. The irony, of course, is that it was the liquor board itself, in that case, which claimed to be a person and lost, being held not to constitute a "person" within the meaning of so much of the APA (RCW 34.04.130) as governs appeals and provides that:

"(1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof only under the provisions of this . . . act. . . ." (Emphasis supplied.)

Because, as a governmental agency, the liquor board was held by the court not to be a "person" it was declared not to have standing to appeal a decision by the state personnel board, under chapter 41.06 RCW, requiring the liquor board to rehire certain employees it had previously severed because of alleged work deficiencies. But if the liquor board was not a person for that purpose then it likewise must follow (until and unless the court reverses itself and rules otherwise) that regardless of its asserted "interest," neither the Federal Trade Commission nor any other governmental agency, federal or state, can be deemed to be an interested person for the similar purpose of petitioning for rule-making proceedings under RCW 34.04.060, supra.

In so concluding, we would hasten to add and emphasize, however, that this does not mean a petition submitted by a governmental agency is a total nullity. As in the case of any plea for the adoption, amendment or repeal of agency

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#### 4 Cont'd:

argument. While it is true that the states, under that amendment, are to regulate the use of intoxicating liquors within their boundaries we find nothing therein, or in any cases construing the 21st Amendment, indicating a constitutional obstacle to such activities by an agency of the federal government.

- 5 Notably on March 10, 1977, after the board had received and decided to proceed in response to the instant petition of the FTC.

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rules, whether submitted in a prescribed form or not, or whether presented by one who is legally an "interested person" or not, a petition submitted by another governmental agency may be accepted and acted upon by the receiving agency if the latter finds the proposed changes to be of merit. That, of course, readily follows from the point made earlier - i.e., that an agency such as the liquor control board is entirely free, at any time, to initiate rule-making proceedings on its own motion.<sup>6</sup>

We trust that the foregoing will be of some assistance to you.

Very truly yours,

SLADE GORTON  
Attorney General



PHILIP H. AUSTIN  
Deputy Attorney General

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<sup>6</sup> Conversely, even when presented with a formal petition under RCW 34.04.060, supra, by one clearly having standing to submit such a document, an agency is empowered either to respond affirmatively (by initiating rule making) or negatively (by denying the petition in writing, stating reasons) in the exercise of its discretion.